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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

PAUL A. WILLIAMS
(CDCR # AF4060),

Petitioner,

v.

BEN CURRY, Warden,

Respondent.

No. C 14-1795 SI (pr)

**ORDER FOR FILING FEE, TO STAY
PROCEEDINGS, AND TO
ADMINISTRATIVELY CLOSE CASE**

Paul A. Williams filed this *pro se* action for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Williams now moves for a stay and abeyance so that he may exhaust state court remedies for several claims. He states that state court remedies have not been exhausted for Claims 2 through 5 of his federal petition. Docket # 10 at 3. Williams requests a stay under *Kelly v. Small*, 315 F.3d 1063 (9th Cir. 2003), noting that it "does not require a petitioner to show good cause for his delay." Docket # 10 at 3. Williams had moved for a stay under a different rationale than in his current motion, so the court will treat the current motion as superseding the earlier one. Williams also has not yet paid the filing fee, which he must do promptly to avoid dismissal of this action.

There are two kinds of stays available in a habeas action: the *Rhines* stay and the *King/Kelly* stay.¹ A stay under *Rhines v. Weber*, 544 U.S. 269 (2005), "is only appropriate when

¹Litigants and courts often refer to the procedure as a "stay and abeyance." The phrase refers to the district court "stay[ing] the petition and hold[ing] it in abeyance while the petitioner returns to state court to exhaust." *Rhines v. Weber*, 544 U.S. 269, 275 (2005). For convenience, the court refers to the combined procedure as a stay.

1 the district court determines there was good cause for the petitioner's failure to exhaust his
 2 claims first in state court," the claims are not meritless, and there are no intentionally dilatory
 3 litigation tactics by the petitioner. *Id.* at 277-78. The *King/Kelly* stay is the second kind of stay
 4 and is an alternative method to deal with a petitioner who has some unexhausted claims he wants
 5 to present in his federal habeas action. Under the procedure outlined in *Kelly v. Small*, 315 F.3d
 6 1063 (9th Cir. 2003), "(1) a petitioner amends his petition to delete any unexhausted claims; (2)
 7 the court stays and holds in abeyance the amended, fully exhausted petition, allowing the
 8 petitioner the opportunity to proceed to state court to exhaust the deleted claims; and (3) the
 9 petitioner later amends his petition and re-attaches the newly-exhausted claims to the original
 10 petition." *King v. Ryan*, 564 F.3d 1133, 1134 (9th Cir. 2009) (citing *Kelly*, 315 F.3d at 1070-71).
 11 A petitioner seeking to avail himself of the *Kelly* three-step procedure is not required to show
 12 good cause as under *Rhines*, but rather must eventually show that the amendment of any newly
 13 exhausted claims back into the petition satisfies both *Mayle v. Felix*, 545 U.S. 644, 655 (2005),
 14 by sharing a "common core of operative facts" and *Duncan v. Walker*, 533 U.S. 167 (2001), by
 15 complying with the statute of limitations. *Id.* at 1141-43.

16 Here, Williams does not satisfy the requirements for a *Rhines* stay because does not show
 17 good cause for failing to exhaust the claims before filing the federal petition, and does not
 18 attempt to show that he was not engaged in intentionally dilatory litigation tactics. *See Rhines*,
 19 544 U.S. at 277-78. The court therefore will not grant a *Rhines* stay.

20 It is easier for a petitioner to obtain a *King/Kelly* stay. The only currently applicable
 21 requirement for a *King/Kelly* stay is that the petition sought to be stayed has no unexhausted
 22 claims. Here, the petition contains both exhausted and unexhausted claims. Rather than deny
 23 the motion due to this easily curable procedural problem, the court opts to dismiss the
 24 unexhausted claims (i.e., Claims 2 through 5), so that the petition will have no unexhausted
 25 claims. Whether these claims (i.e., Claims 2 through 5) that Williams intends to exhaust will
 26 relate back to the petition can be decided when he returns after exhausting state court remedies
 27 and moves to amend his petition to add those newly-exhausted claims. The court will grant a
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1 King/Kelly stay so that Williams may exhaust state court remedies for claims he wishes to
2 present to this court. Williams must file his unexhausted claims in state court within thirty days,
3 and must return to federal court within thirty days of a final decision by the state courts on those
4 claims. *See Kelly*, 315 F.3d at 1070.

5 Williams' motion for a stay and abeyance is GRANTED. (Docket # 10.) Williams'
6 earlier motion for a stay and abeyance is DISMISSED as moot. (Docket # 1.) After Williams
7 concludes his state court efforts to exhaust his new claim, he may move to file an amended
8 petition in which he presents all his claims, including the now dismissed Claims 2 through 5.

9 For the foregoing reasons, this action is now STAYED and the clerk shall
10 ADMINISTRATIVELY CLOSE the action. Nothing further will take place in this action until
11 Williams exhausts any unexhausted claims and, within thirty days of doing so, moves to reopen
12 this action, lift the court's stay and amend his petition to add the newly exhausted claims.

13 Williams was ordered to pay the filing fee no later than October 31, 2014, but failed to
14 do so. The court will give him one more chance: Williams must pay the \$5.00 filing fee no later
15 than **December 12, 2014**. If the court has not received the filing fee by that date, the action will
16 be dismissed. The stay of this action does not relieve him of the obligation to pay that fee by
17 that deadline.

18 IT IS SO ORDERED.

19 DATED: November 10, 2014



SUSAN ILLSTON
United States District Judge

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